

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARTHA BERNDT, et al.,

Plaintiffs,

No. C 03-3174 PJH

v.

**ORDER GRANTING MOTION FOR
RULE 35 ORDER**CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

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Defendants' motion for a Rule 35 order for the mental examinations of plaintiffs Berndt, Morin, and Boyd came on for hearing before this court on June 12, 2013. Plaintiffs Martha Berndt, Kimberly Morin, and Lisa Boyd ("plaintiffs")¹ appeared through their counsel, Pamela Price and Simona Farrise. Defendants California Department of Corrections and Rehabilitation, Teresa Reagle, Joseph McGrath, David Skerik, and Dr. Dwight Winslow ("defendants") appeared through their counsel, Lyn Harlan. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motion, for the reasons stated at the hearing and as follows.

Federal Rule of Civil Procedure 35 allows a court to order a party to submit to a mental examination, if the party's mental condition is in controversy and if the order is supported by good cause. Fed. R. Civ. P. 35(a)(1), (a)(2)(A). In this case, plaintiffs do not dispute that their mental conditions are in controversy, as all three seek substantial

¹The other plaintiffs in this case are Marta Hastings, Sophia Curry, Shelly Adcock, Patricia Moreira, Karen Currie, Raissa Jeffries, and the estate of Judy Kay Longo. For purposes of this order, the term "plaintiffs" shall refer only to plaintiffs Berndt, Morin, and Boyd, since those three are the only plaintiffs involved with this motion.

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1 damages for emotional distress. However, in their opposition to defendants' motion,
2 plaintiffs argue that defendants have not demonstrated good cause for the requested
3 mental examinations, because "the information sought through a mental exam may be
4 available by other means." Specifically, plaintiffs argue that they have already undergone
5 "extensive psychological evaluations" and that "defense counsel has subpoenaed medical
6 records and psychiatric records and gained unlimited access to their workers'
7 compensation records." The court finds this scenario similar to that in Lester v. Mineta, in
8 which that court agreed that "the examiners should thoroughly review all available materials
9 relevant to plaintiff's mental health prior to the exams, both as context and to avoid
10 redundant testing," but was ultimately "unpersuaded that a comprehensive forensic
11 psychological and psychiatric exam can be pieced together using the scattered information
12 already available." 2006 WL 3741949, *2 (N.D. Cal. Dec. 19, 2006) (granting Rule 35
13 motion). Here, too, the court is unpersuaded that plaintiffs' previous medical records are
14 sufficient to preclude any further examination into plaintiffs' mental conditions. These three
15 plaintiffs seek damages for ongoing emotional distress, and defendants are entitled to an
16 opportunity to rebut plaintiffs' claims.

17 Plaintiffs raise two other issues in their opposition to defendants' motion. First, they
18 argue that defendants' motion did not specify the "manner, conditions, and scope" of the
19 proposed examinations. Defendants provided such information in their reply brief, thereby
20 mooted plaintiffs' objection. Second, as to plaintiff Berndt, plaintiffs argue that "defendants
21 should be required to either arrange for the testing to occur near Ms. Berndt's home in
22 Washington state or bear all of the expenses of having her travel to the Bay Area."
23 However, the "general rule is that the party being examined must pay his or her own travel
24 expenses to an examination in the forum state." McCloskey v. United Parcel Service
25 General Services Co., 171 F.R.D. 268, 270 (D. Or. 1997) (internal citation omitted). The
26 court also notes that plaintiffs themselves chose this forum in which to litigate.

27 For the foregoing reasons, the court GRANTS defendants' motion for a Rule 35
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1 order compelling the mental examinations of plaintiffs Berndt, Morin, and Boyd. The
2 examinations shall take place at the offices of defendants' experts in San Francisco,
3 California. At the hearing, the parties were ordered to meet and confer regarding the
4 details of the examinations, and to provide a stipulation by **June 19, 2013**. If the parties
5 are unable to reach agreement, plaintiffs may file a five page brief in support of their
6 requested protective order by **June 19, 2013**, and defendants may file a five page
7 response by **June 24, 2013**.

8 Finally, as stated at the hearing, the court is in receipt of medical records for plaintiff
9 Marta Hastings. The records appear to have been sent by plaintiff Hastings' treating
10 facility, in response to a subpoena issued by defendants. Defendants were directed to
11 prepare a release form, in accordance with HIPAA, for Ms. Hastings' signature. Once the
12 court receives the signed release form, it shall turn the records over to defendants. If
13 plaintiff refuses to sign a release, she shall be precluded from relying on this evidence at
14 trial.

15 **IT IS SO ORDERED.**

16 Dated: June 18, 2013



17 PHYLIS J. HAMILTON
18 United States District Judge

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